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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-976.

FALSTAFF BREWING CORPORATION,
Petitioner,

v.

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF IN SUPPORT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979.

No. 79-1220.

FALSTAFF BREWING CORPORATION,
Petitioner,

v.

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF IN SUPPORT OF CERTIORARI.

The instant case raises the question of the proper relationship between the labor contract and external law; between labor arbitration and the judicial system; between private and public fori for dispute settlement. One of the important aspects of that relationship is the proper scope of post-arbitral review. In *Enterprise Wheel,*[1] this Court addressed the issue, but—as has often been pointed out—the issue was not settled. As a result, the Circuits have evolved differing and conflicting readings of *Enterprise Wheel.* It is now the time, we respectfully submit, for this Court to speak definitively to the issue of the scope of judicial review of arbitral awards.

1. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960).

I.

Since 1960, when *Enterprise Wheel* was decided, lower courts and commentators [2] have differed as to interpretation of *Enterprise Wheel* regarding the scope of judicial review of arbitral decisions. Such differences have been more than justified because *Enterprise Wheel* is ambiguous: it is not clear whether the labor contract or external law is paramount; and *Enterprise Wheel* did not assign finality to any particular issue when decided by the arbitrator.

In *Enterprise Wheel*,[3] this Court, referring to the arbitrator's interpretation of the labor agreement, said "the courts have no business overruling him because their interpretation of the contract is different from his". At the same time, this Court said that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice * * * his award is legitimate only so long as it draws its essence" from the labor agreement. This Court concluded that: "When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U. S. at 597.

Enterprise Wheel is thus far from plain in its definition of the relationship between the labor agreement and external law—between finality of the arbitral award and the

2. Among recent articles are: R. I. Bloch, *Labor Arbitration's Crossroads Revisited: The Role of the Arbitrator and the Response of the Courts*, 47 U. of Cinn. L. Rev. 363 (1978); T. J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and its Progeny*, 75 Mich. L. Rev. 1137 (1977); H. T. Edwards, *Arbitration At The Crossroads: The "Common Law of the Shop" v. External Law*, 32 The Arb. J. 65 (1977); and *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 U. C. L. A. Law Rev. 936 (1976).

3. 363 U. S. at 599.

scope of judicial review under external law. Therefore, not surprisingly, the Circuits have announced various and conflicting formulations of the scope of post-arbitral review, all based ostensibly upon a reading of *Enterprise Wheel's* so-called "essence" test.

II.

The Third Circuit's formulation of the *Enterprise Wheel* "essence" test appears in *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1960), where Judge Aldisert noted that the courts which have attempted to apply *Enterprise Wheel* have met the problem of formulating a consistent and workable standard to be utilized in exercising the function of review. He observed:

> Circuit and District Court decisions have not exuded uniformity in translating the "essence" test into a pronouncement of the appropriate extent or limitation of judicial review of the arbitrator's interpretation. 405 F. 2d at 1126.

The following is a sampling of views of the Circuits which have interpreted *Enterprise Wheel's* essence test:

—Where *the* "fact" underlying an arbitrator's decision is a *non-fact*, or there was a "gross mistake", the award cannot stand.[4]

—An arbitrator's award may be vacated if the arbitrator had no ground upon which to base his interpretation.[5]

4. *Electronics Corp. v. International U. of E., R. & M. W., L.* 272, 492 F. 2d 1255, 1257 (1st Cir. 1974).

5. *H. K. Porter Co., Inc. v. United Saw, File and Steel Products Workers of America, etc.*, 333 F. 2d 596, 602 (3rd Cir. 1964).

—The Court should interfere where the arbitrator clearly went beyond the scope of the submission,[6] or where the authority to make an award cannot be found or legitimately assumed from the terms of the arbitration agreement,[7] or if the arbitrator made a determination not required for the resolution of the dispute.[8]

—The reviewing court should not disturb the award so long as the interpretation was not arbitrary,[9] or even though the award permits the inference that the arbitrator may have exceeded his authority,[10] or merely because it believes that sound legal principles were not applied.[11]

—There should be no review whatsoever of an arbitrator's interpretation of the agreement.[12]

—Where the award is not derived from the agreement in a rational way, viewed in light of its language,

6. *Textile Workers Union of America, etc. v. American Thread Co.*, 291 F. 2d 894, 897-898 (4th Cir. 1961).

7. *Truck Drivers and Helpers Union Local 784 v. Ulry-Talbert Co.*, 330 F. 2d 562, 563 (8th Cir. 1964).

8. *Socony Vacuum Tanker Men's Ass'n v. Socony Mobil Oil Co.*, 369 F. 2d 480, 482 (2nd Cir. 1966).

9. *Local 7-644 Oil, Chemical & Atomic Workers International Union v. Mobil Oil Co.*, 350 F. 2d 708, 712 (7th Cir. 1965).

10. *Brotherhood of Railroad Trainmen v. St. Louis Southwestern Ry. Co.*, 220 F. Supp. 319, 325 (E. D. Tex. 1963).

11. *Dallas Typographical Union, No. 173 v. A. H. Belo Corp.*, 372 F. 2d 577, 581 (5th Cir. 1967).

12. *International Brotherhood of Pulp, Sulphite and Paper Mill Workers Local Union No. 874 v. St. Regis Paper Co.*, 362 F. 2d 711, 714 (5th Cir. 1966); *Western Iowa Pork Co. v. National Brotherhood Packinghouse and Dairy Workers*, 366 F. 2d 275, 277 (8th Cir. 1966); *American Machine & Foundry Co. v. United Auto, Aerospace and Agr. Implement Workers*, 256 F. Supp. 161, 162 (S. D. N. Y. 1963); aff'd, 329 F. 2d 147 (2nd Cir. 1964).

its context, and any other indicia of the parties' intention, the reviewing court may vacate the award.[13]

—The award must not be a capricious, unreasonable interpretation of the contract.[14]

—It must be possible for an honest intellect to interpret the words of the contract and reach the result the arbitrator reached.[15]

III.

The Third Circuit's formulation of the *Enterprise Wheel* "essence" test in *Honold* is as follows:

> Accordingly, we hold that a labor arbitrator's award does "draw its essence from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.
>
> 405 F. 2d at 1128.

Obviously, in the above formulation of the Third Circuit—as in *Enterprise Wheel*—there is an unresolved tension between the primacy of the labor agreement versus the primacy of external law.

13. *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F. 2d 1123 (3rd Cir. 1969).

14. *Holly Sugar Corp. v. Distillery Rectifying, Wine & A. W. I. U. Workers*, 412 F. 2d 899, 904 (9th Cir. 1969).

15. *San Francisco-Oakland Newspaper Guild v. Tribune Pub. Co.*, 407 F. 2d 1327, 1328 (9th Cir. 1969).

In the Third Circuit itself this tension has resulted in conflicting decisions. In *Bieski v. Eastern Auto Forwarding Co.*, 396 F. 2d 32, 38 (3d Cir. 1968), the Third Circuit rejected "gross mistake" as a reason for judicial review, thereby overruling *H. K. Porter Co., Inc. v. United Saw, etc. Workers of America,* 333 F. 2d 596 (3d Cir. 1964). In *Honold* the Third Circuit appears to have reinstated *Bieski* by holding that review is permitted when the arbitrator's interpretation is "totally unsupported by principles of contract construction", i.e., by external law.

IV.

The instant case would, we submit, have been decided by the courts below in favor of Falstaff, had they had a mandate from this Court under which they would have been constrained to examine and study the record. Had the courts below done so, they would have found that:

—The Arbitrator's conclusion that there was an unlawful contracting-out by Falstaff of the bargaining unit work was a *non-fact,* not supported at all in the record. The two independent beer distributors—who sought to fill the economic vacuum which resulted from Falstaff's shut-down of its North Bergen Depot and who bought beer at *wholesale* from Falstaff's Cranston, Rhode Island plant—never had, even in the aggregate, more than 3,000 customers. There never has been any explanation as to how Falstaff could have "converted" to distribution of beer to its former 17,000 customers as a result of the independents' activities.

—The finding that "agreements were made by the company to have two distributors market and deliver their products within the areas designated to be served by employees represented by the Union" was a *non-fact.*

—The finding that Falstaff never protested the arbitrability of the contract termination issue was a *non-fact.* When the Union wrote to the arbitrator in an attempt to enlarge the narrow scope of the grievance, Falstaff wrote in reply: "the company strenuously objects to the union's demand for arbitration regarding * * * reopening the Depot which is completely shut down at this time after the contract with the Union was terminated * * * This arbitration [sic] does not nor *could not have jurisdiction over these issues*".

—The Union asserts (Brief, p. 11, note 3) that Falstaff sent a written notice of its desire to terminate the parties' labor agreement effective May 31, *1977* (at the end of the automatically renewed term erroneously found by the arbitrator), but the record is barren of any such document. However, Falstaff accepts the Union's concession that the labor contract was terminable by a single written notice of one party's desire to terminate the agreement, a notice which was given by the Union to Falstaff and which forestalled any possibility of automatic renewal of the contract.

—The revelant provision of the labor agreement requires that to effect a termination a party need give only *one* notice to the other party that "changes are desired herein *and* that the desired changes will be submitted * * *".

V.

The parties to a collective bargaining agreement should, we submit, have a reasonable expectation that an arbitrator's determinations under a labor agreement will be at some point reviewed, in some fashion, in accordance with external law, by a federal judge, particularly with respect to issues as to which the arbitrator clearly has no special competence, and issues such as jurisdiction,

arbitrability, due process and like which historically fall within the province of a court. If that is not a completely justifiable expectation, this Court should emphatically now so announce.

Neither of the two key issues in the instant case falls within any area of any special arbitral expertise. The contracting-out issue and the contract termination issue simply involve principles of external contract law. The determination of questions of contract law which are devoid of any special labor law considerations, is uniquely the province of a court rather than of an arbitrator.[16] Nor was there in this case any history of collective bargaining between Falstaff and the Union to be relied upon by the arbitrator. Whatever the arbitrator's "greater institutional competency", *NLRB v. Acme Industrial Co.*, 385 U. S. 432, 436, 87 S. Ct. 565 (1967), or whatever his "new expertise", *NLRB v. Strong*, 393 U. S. 357, 365, 89 S. Ct. 541 (1969), the two key issues herein were uniquely within the province of the court. No questions involving the application of the "common law of the shop" were involved. The arbitrator determined the two key issues in favor of the Union (contrary, we submit, to external law), and ordered Falstaff to pay the Union more than $1.8 million. In easy reliance on the arbitral award, the District Court affirmed. In easy reliance upon the District Court's disposition of the case, the Court of Appeals affirmed the District Court.

VI.

The contract termination issue was a jurisdictional issue,[17] and should have been given plenary review under

16. *Cf. Pullman, Inc. v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers*, 354 F. Supp. 496, 499 (E. D. Pa. 1972).

17. *International Brotherhood of Teamsters, etc., Local 249 v. Western Pennsylvania Motor Carriers Association*, 574 F. 2d 783 (3rd Cir. 1978).

external law. Certainly, if there had been no automatic renewal of the labor contract for an additional 12 month period, then, obviously, the arbitrator would have had no basis for any award relating to that additional year period. The delineation of the proper relationship between the labor contract and external law is even more imperative as to such issues which affect the arbitrator's very jurisdiction and power and authority to act.

Based, we submit, on a misreading of *Enterprise Wheel*, the courts below refused to give even the jurisdictional issue some kind of plenary review. Had there not been the constraint of its misinterpretation of *Enterprise Wheel*, the District Court, in the first instance, would have decided the contract termination issue, we submit, in favor of Falstaff. It was plainly intimated by the District Court that it felt that the arbitrator's ruling on the contract termination clause was contrary to principles of external law:

> My subjective opinion as to the proper construction or application of the clause is of no moment here. * * * Whether such an interpretation is the best interpretation is not a matter for this Court *Enterprise Wheel and Car Corp., supra,* at 599. (Petition, A29-A30)

The District Court's very citation of *Enterprise Wheel* emphasizes the pressing necessity for this Court to announce a clear delineation of the scope of judicial review of arbitral awards.

VII.

It has been pointed out that giving a finality to arbitral awards is repugnant to the provision in labor contracts prohibiting the arbitrator from "adding to, subtracting

from or modifying" any of its terms. The labor contract in the instant case contains such a clause (Article XI), and provides that "the arbitrator shall have no power to *add to or subtract from or modify* any of the terms of this Agreement or any agreement made supplemental thereto." Even the most conscientious exponent of the arbitrator as a "contract reader" will concede that when a labor agreement contains such a no-modification provision, arbitral finality is foreclosed, and the court has broad power of review. *Torrington v. Metal Workers Local 1645*, 362 F. 2d 667 (2d Cir. 1966).

VIII.

Twenty years after *Enterprise Wheel*, the relationship between labor arbitration and the courts remains obscure. The instant case offers this Court an opportunity to fix the parameters of judicial review over arbitral determinations, an important area in which the Circuits are hopelessly divided.

In defining the scope of review, this Court should give finality to those issues which fall within an arbitrator's special expertise, but leave open for possible judicial correction clear violations by the arbitrator of external law and procedural issues which affect fairness and due process. In the instant case, for example, the arbitrator ignored the fact that the grievance related only to contracting-out, and not to any shut-down of the Depot, and that counsel for the Union even noted of record that the Union filed its grievance after Falstaff sales at wholesale to the two independents, and not because of Falstaff's shut-down of the Depot.

CONCLUSION.

For the above reasons, and the reasons stated in Falstaff's petition, a writ of certiorari should issue to review the Judgment Order of the Third Circuit entered on October 22, 1979.

Respectfully submitted,

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